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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No: **056972/2024**

REPORTABLE: No

OF INTEREST TO OTHER JUDGES:

REVISED:

DATE 31 JANUARY 2025

SIGNATURE

In the matter between:

TSHIPU KLEINBOOI NGAKO

Applicant

and

BRYTE INSURANCE COMPANY LIMITED

First Respondent

MOBILITY INSURANCE UNDERWRITING MANAGERS

Second Respondent

This judgment is prepared and authored by the Judge whose name is reflected as such and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 31 January 2025.

JUDGMENT

INTRODUCTION

[1] The applicant, on application seeks amended relief as against the first respondent only for the payment of R577,800.00, being the equivalent of the retail value of the applicant's insured motor vehicle, a Toyota Quantum / HiAce 2.5D

Sesfikile 2023 with registration number J[...] [the vehicle] for his loss as a direct result of the theft of vehicle.

[2] The applicant's counsel, during oral submissions on the date of the hearing of the application moved for an amendment to the notice of motion, moving only for amended prayer 1 and prayer 4 option. Such amendment not opposed and duly granted. The matter for adjudication confined to the first respondent's liability and costs.

[3] The first respondent raises a point in *limine* on the basis that the papers are littered with factual material disputes which cannot be resolved on affidavit, such material factual disputes foreseeable and as such the matter stands to be dismissed. Over and above the point in *limine*, the first respondent disputes liability on the basis that the applicant has failed to comply with the terms of the agreement in that the applicant failed to demonstrate that a tracking device was fitted and that it was operational on the date of loss being the 17 November 2023.

COMMON CAUSE AND ADMITTED FACTS FOR CONSIDERATION

[4] It is common cause that the applicant and the first respondent entered into a written agreement on the 6 November 2023 [agreement] in which the first respondent insured the applicant's vehicle from loss, including theft.

[5] The conclusion of the agreement was preceded by a proposal which contained the following material questions: "*Is your vehicle fitted with a tracker?*", to which the applicant answered yes, and "*Is the Tracker certificate attached? Note vehicles over R80 000.00 require a tracking device, should a tracking device not be fitted & operational as date of loss, then Theft and Hijacking will not be covered. Note? Proof required within fourteen days.*"

[6] No tracker certificate was attached to the proposal form.

[7] On the 15 November 2023, the applicant took ownership of the vehicle.

[8] The applicant did not conclude an agreement with Cartrack.

[9] On the 23 November 2023, the applicant lodged a claim in terms of the agreement for the alleged loss of the vehicle, caused by robbery and hijacking occurring on the 17 November 2023.

[10] No tracking records were provided for the vehicle's whereabouts on the date material of loss on the 17 November 2023 nor at the material alleged time of such loss.

[11] The applicant's claim was rejected on the 22 December 2023, in writing.

[12] The conclusion of the letter of rejection, set out the basis of the decision taken by the first respondent. The first respondent sets out that a detailed investigation of the claim was undertaken, and a compulsory requirement of the insurance cover was highlighted being that an operational tracking device must have been fitted; that such failure is material to the loss suffered and accordingly formed the basis for the decision. The applicant was made aware that he could contact the Ombudsman for Short-Term Insurance, that he could make further representation within ninety (90) days requesting the review of the decision and by providing additional information which he deemed necessary to assist and he could seek legal advice.

[13] According to the letter of rejection, the claim was rejected on the basis that no tracking device was installed. That conclusion was reached on the basis of a decision taken by the first respondent. Such decision was set out in the letter of rejection to which the applicant does not refer. The decision is clear that there was a detailed investigation of the claim and that there was a compulsory requirement of the insurance cover that an operational tracking device must have been fitted; that such failure is material to the loss suffered and accordingly formed the basis for the decision. The applicant was made aware that he could contact the Ombudsman for Short-Term Insurance, that he could make further representation

within ninety (90) days requesting the review of the decision and by providing additional information which he deemed necessary to assist and he could seek legal advice.

[14] On the 8 March 2024 the applicant through his attorney of record, Messieurs Makgopa Attorneys, informed the first respondent that the applicant wished to review of the decision and as such, requested the transcribed records from the first respondent. No review was initiated.

[15] On the 9 May 2024, the first respondent responded to the letter of the 8 May 2023, by requesting copies of further documents, stating the following:

“To this end, kindly provide us with:

- 1. Confirmation of the tracker company used;*
- 2. Proof of installation;*
- 3. Proof of monthly payment made on the tracking company;*
- 4. The agreement between the insured and the tracking company; and*
- 5. The tracking report for the 17th of November 2023.”*

[16] The applicant did not supply further documents.

[17] On the 17 May 2024, the first respondent confirmed that they on their own accord would obtain records from Tracker to make a final decision which would be communicated to the applicant. On the same date the applicant’s attorneys enclosed a consent form signed by the applicant in which they stated the following:

“We are of the view that our client has complied with all material terms thereof (the terms of the insurance company – own emphasis) therefore

there is no need to take this matter to court which will result in unnecessary costs. Should this matter not be amicably resolved by no later than Wednesday the 22nd we hold instructions to file a court application.”

[18] This application was initiated on the 23 May 2024.

APPLICANT'S CASE

[19] The applicant contends that the first respondent is liable to pay him the amount claimed, being the retail value of the vehicle in that he under oath stated at paragraph 7.2 of the founding papers that *“I lodged and submitted a claim with the respondents in terms of the insurance contract”* and that notwithstanding the lodgement and submission of the claim in terms of the insurance contract, the first respondent on the 22 December 2023 rejected and or repudiated his claim on the basis that *“- I misrepresented the fact, when I said the insured vehicle was fitted with a tracker”*. The applicant maintained at paragraph 8.13 of its founding papers that that the material enquiry is *“-whether, the insured vehicle at the time of the theft (17 November 2023-own emphasis) was fitted with a tracker or not, if we accept the trackers records to be valid and proof that indeed the insured vehicle was fitted with a tracker, then I have not made any misrepresentation and there is no reason for the Respondent to refuse to comply with their obligations in terms of the insurance contract.”* He further states under oath that the applicant pursues its claim on the basis that such repudiation has no merit, and the first respondent is merely attempting to evade the obligation in terms of the insurance contract.

[20] In support of the first enquiry on the applicant's version, whether the vehicle was fitted with tracker on the 17 November 2023 he, in reply attached an installation certificate that a device was fitted to a vehicle bearing registration number C[...] on the 9 August 2023. The admissibly, veracity and nexus to the applicant's vehicle as at the 17 November 2023 was placed in dispute and not dealt with in reply. A material disputed fact on the applicant's own version.

[21] The second enquiry, if the tracker records for the 18 November 2023 are accepted then, sufficient proof that the vehicle was fitted with a tracker has been achieved. The tracking records relied on by the applicant, are not for the 17 November 2023, and do not illustrate the applicant's vehicle's registration number let alone any vehicle registration number. The first respondent placed the admissibility and veracity of the tracking records in dispute stating further that if the Courts admit them into evidence, such record do not comply with the Electronic Communication Transaction Act, 25 of 2002. The evidentiary challenge has not been met by the applicant in reply.

THE FIRST RESPONDENT'S CASE

[22] The first respondent raises a point in *limine* on the basis that the papers are littered with factual material disputes which cannot be resolved on affidavit, such material factual disputes foreseeable and as such the matter stands to be dismissed. Over and above the point in *limine*, the first respondent disputes liability on the basis that the applicant has failed to comply with the terms of the agreement in that the applicant failed to demonstrate on the papers, that a tracking device was fitted and was operational as at the date of loss, the 17 November 2023 and that the proof of its installation was furnished within fourteen (14) days of signing of the proposal form. That although a claim form was submitted, the veracity of the annexures were not admitted.

[23] The first respondent also relied on the undisputed term of the policy terms and conditions document which would explain its enquiry of the 9 May 2023, namely:

23.1. Paragraph 24 under the heading "C. TRACKING DEVICE WARRANT", the provisions, *inter alia* contain:

23.1.1. The tracking device must always be in working order and activated;

23.1.2. The insured must have a legally valid contract with the supplier of the tracking device and fees must be paid on time to ensure continuity of the contract;

23.1.3. The device must be tested every six months or self-tested regularly;

23.1.4. The theft or hijacking must be immediately reported to the service provider / supplier of the tracking device.

[24] The first respondent also disputed that it was liable to pay the retail value as claimed, referring to section 1 dealing with motor comprehensive and at paragraph 2 headed “COVER LIMITS” states that:

“The maximum Cover Limits will be the lesser of the adjusted retail value of the vehicle and specified extras, which considers the said condition of the vehicle and specified extras, and the sum insured, prior to the reduction of the applicable excess. Please refer to the attached schedule of Cover Limits and applicable excess amounts.”

[25] The applicant’s Counsel did not raise any submissions to disturb the application of paragraph 24 nor section 1 to the raised dispute.

CONCLUSION

[26] From the facts and from the vain repetition by the first respondent to explicitly set out and explain in the answering affidavit the shortcomings of the applicant’s case, the foreseeable outcome was missed. This is even so on the applicants on material enquiry he posed in paragraph 8.13 of his founding papers. The applicant has failed to prove his own case. The application stands to be dismissed.

[27] As to costs, costs are to follow the result on scale B. Counsel for the respondent argued for Scale C on the basis of the quantum of the matter. This did not elicit a rebuttal or objection from counsel for the applicant. However, notwithstanding the same, the aspect of costs is in the discretion of the Court. The Court has taken into consideration not only the quantum of the matter but the complexity of the matter and considers that Scale B is fair and reasonable.

[28] Having regard to the aforesaid, the following order follows:

1. The applicant's application is dismissed with costs, to be taxed on scale B.

L.A. RETIEF

Judge of the High Court

Gauteng Division

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Date of hearing:

28 January 2024

Date of judgment:

31 January 2024